No. 94-900

IN THE

Supreme Court Of The United States

October Term, 1994

COMMISSIONER OF INTERNAL REVENUE,
Petitioner

v.

ERICH E. AND HELEN B. SCHLEIER,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE MIGRANT LEGAL ACTION PROGRAM, INC. AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[*]

The Migrant Legal Action Program, Inc. ("MLAP") is a national legal services support center that represents migrant and seasonal agricultural workers throughout the nation. MLAP provides assistance to farmworkers, directly and indirectly, in a wide variety of legal matters, including suits arising under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* ("FLSA").

FLSA plaintiffs in general are among the most "unprotected, unorganized and lowest paid of the nation's working population." *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 707 n.18 (1945). Migrant farmworkers, in particular, "remain today, as in the past, the most abused of all workers in the United States."[1] In addition to being frequent victims of unlawful labor practices, they typically live in substandard housing, have little or no access to medical care, and suffer from malnutrition and high rates of occupationally related illness and injury. Given their extreme poverty, they are likely to suffer grave harm and emotional distress when deprived of minimum wages due them. They thus are keenly in need of the full benefit of any recovery from FLSA suits. Like other victims of tort and tort-like injuries, their benefits would be reduced if they were subject to federal social security and income taxes.

The remedial provisions of the statute at issue in this case -- the Age Discrimination in Employment Act of 1967,

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[*] The parties' written consents to the filing of this brief are being filed today with the Clerk of the Court.

[1] H.R. Rep. No. 885, 97th Cong., 2d Sess. 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4547, 4548. The median family income for seasonal agricultural workers is between $7,500 and $10,000 annually. Office of Program Economics, U.S. Dep't of Labor, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY 1990 54 (1991).

29 U.S.C. § 621 *et seq.* ("ADEA") -- incorporate the remedial provisions of the FLSA. *See Lorillard* v. *Pons*, 434 U.S. 575 (1978). The decision in this case is, therefore, likely to affect the tax treatment of damages awarded under the FLSA. While the total amount of money at stake for migrant farmworkers may not be large in absolute terms, an adverse ruling would have a very real impact on the health and welfare of the poorest of this nation's laborers and their families. MLAP and its farmworker clients consequently have a strong interest in the outcome of this case.

SUMMARY OF ARGUMENT

The issue in this case is whether damages received for a willful violation of the ADEA are excludable from income under § 104(a)(2) of the Internal Revenue Code. The remedial provisions of the ADEA are based, in large part, on those of the FLSA. *See Lorillard*, 434 U.S. at 580-83.

Section 104(a)(2) of the Code provides in relevant part that a taxpayer's gross income does not include "the amount of any damages received . . . on account of personal injuries or sickness." The regulations promulgated by the Commissioner, Treas. Reg. § 1.104-1(c), define the term "damages received" to include amounts received through prosecution or settlement of "a legal suit or action based upon tort or tort type rights." This Court held in *United States* v. *Burke*, 112 S. Ct. 1867 (1992), that § 104(a)(2) applies to a recovery when the remedies available under the "relevant cause of action" recompense the plaintiff for pecuniary losses and for "intangible elements of injury" which are "not pecuniary in their immediate consequence." *Id.* at 1871-73.

The FLSA provides for liquidated damages as well as back wages. Liquidated damages compensate for obscure

and difficult to prove injuries to health and well-being suffered by a worker who does not receive statutory minimum wages on time. *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945). These damages meet the *Burke* standard of compensating for "intangible elements of injury" which are "not pecuniary in their immediate consequence."

The Commissioner erroneously contends that the holding of *Brooklyn Savings Bank* was vitiated by § 11 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 260. According to the Commissioner, because § 11 of the Portal-to-Portal Act "limit[ed] the availability" of liquidated damages in cases where the employer has acted in good faith, those damages no longer serve a compensatory purpose but rather serve only to punish employers who act in bad faith. In fact, § 260 merely provides the court with the *discretion* to remit liquidated damages where the employer meets a stringent test of good faith and reasonable grounds. Conversely, an employee can, in the court's discretion, recover liquidated damages even against an employer who meets that stringent test.

Thus, liquidated damages under the FLSA cannot be considered punitive. Indeed, even the Commissioner has taken the position -- in a revenue ruling issued more than two decades after enactment of the Portal-to-Portal Act -- that liquidated damages under the FLSA, as amended by the Portal-to-Portal Act, are compensatory, not punitive. *See* Rev. Rul. 69-581, 1969-2 C.B. 25.

ADEA damages also meet the *Burke* test. The ADEA incorporates the FLSA's remedial scheme, including provisions for backpay and liquidated damages, although it limits the availability of liquidated damages to cases where the violation of the statute is willful. This court has held that Congress intended for those remedial provisions of the FLSA that were incorporated into the ADEA to have the

same meaning as under the FLSA. *Lorillard*, 434 U.S. at 581 (1978). Both Congress's use of the FLSA term "liquidated damages" in the ADEA remedial scheme and the case law establish that ADEA liquidated damages, like FLSA liquidated damages, compensate for "intangible elements of injury" which are "not pecuniary in their immediate consequence."

The Commissioner's reliance on *Trans World Airlines* v. *Thurston*, 469 U.S. 111 (1985), as confirming her notion that ADEA liquidated damages are "solely" punitive is misplaced, for four reasons. First, *Thurston* dealt only with *when* a violation should be considered willful. Second, numerous cases in the Courts of Appeals have found, post-*Thurston*, that ADEA liquidated damages serve both a compensatory and punitive purpose. Third, the limited availability of ADEA liquidated damages represents nothing more than a legislative compromise between the interests of employers and employees: only employers who are willful violators are made liable for intangible, nonpecuniary injuries. It does not imply a judgment on Congress's part that liquidated damages are solely punitive in nature.

Fourth, the Commissioner's litigating position is inconsistent with her recent revenue ruling interpreting § 104(a), Rev. Rul. 93-88. The Commissioner argues that damages which may be awarded only against especially culpable defendants are inherently punitive and thus cannot be considered compensatory within the meaning of § 104(a). Yet she has taken the position in Rev. Rul. 93-88 that damages which may be awarded only in cases of intentional discrimination under the Civil Rights Act of 1991 do meet the *Burke* test and hence are excludible from income under § 104(a).

ARGUMENT

I. FLSA LIQUIDATED DAMAGES MEET THE *BURKE* TEST

A. This Court Has Established That Liquidated Damages Under The FLSA Compensate For Intangible, Non-Pecuniary Injuries.

The FLSA was enacted by Congress in 1938 in order to "protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being." *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 706 (1945). This goal was accomplished, in part, by "eliminating starvation wages." *See Bumpus* v. *Continental Baking Co.*, 124 F.2d 549, 552 (6th Cir. 1941). Thus, the FLSA prescribes a minimum wage which employers must pay (29 U.S.C. § 206), and requires overtime pay in certain circumstances (29 U.S.C. § 207). Under 29 U.S.C. § 216, employees may, in a private action for violation of § 206 or 207, recover (a) unpaid minimum wages and overtime compensation, as well as (b) an additional equal amount as liquidated damages. Liquidated damages are automatic under the statute, although if the employer "shows to the satisfaction of the court that the act or omission giving rise to [the lawsuit] was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA]" the court may, in its discretion, remit the award of liquidated damages in whole or in part. 29 U.S.C. §§ 216, 260.

The Commissioner does not dispute that, prior to 1947, liquidated damages awarded under the FLSA were compensatory. *See* Pet. Brf. at 22-23 & 26 n.17. As this Court held in *Overnight Motor Transportation Co.* v. *Missel*,

316 U.S. 572, 583-84 (1942), and reiterated in *Brooklyn Savings Bank*:

> "[T]he liquidated damage provision [of the FLSA] is not penal in its nature but constitutes compensation for the retention of a workman's pay which might result in *damages too obscure and difficult of proof for estimate other than by liquidated damages*." *Brooklyn Savings Bank*, 324 U.S. at 707 (emphasis added).

Thus, liquidated damages under the FLSA compensate for nonpecuniary losses. As the court explained in *Brooklyn Savings Bank*, the liquidated damages provision "constitutes a Congressional recognition that failure to pay the statutory minimum on time may be . . . detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency and general well-being of workers.'" *Id.* Employees receiving less than the minimum "are not likely to have sufficient resources to maintain their well-being and efficiency until such sums are paid at a future date." Thus, "double payment must be made in the event of delay *in order to insure restoration of the worker to that minimum standard of well-being*." *Id.* at 707-08 (emphasis added). In short, employees who are deprived of the minimum wage to which they are entitled suffer detriment to their health and dignity that cannot be redressed simply by later repayment of the lost wages.

Damages that are "obscure and difficult of proof" and that compensate for "detriment[] to" the worker's "health . . . and general well-being" clearly meet the *Burke* standard of providing compensation for "intangible elements of injury" which are "not pecuniary in their immediate consequence."

B. The Portal-to-Portal Act Did Not Vitiate This Court's Holdings That FLSA Liquidated Damages Are Compensatory.

The Commissioner contends that liquidated damages under the FLSA must now be considered punitive rather than compensatory, i.e., that the holdings of this court in *Overnight Motor Co.* and *Brooklyn Savings Bank* are no longer valid, because of the amendments made to the FLSA in the Portal-to-Portal Act of 1947.[2] Section 11 of that Act, 29 U.S.C. § 260, permits a court to remit liquidated damages if the employer has met strict tests of both good faith and reasonableness. The Commissioner states that the amendment "limit[ed] the *availability* of liquidated damages under [the FLSA] in situations where the employer had acted 'in good faith' and with 'reasonable grounds for believing that his act or omission was not a violation' of the Act." (Pet. Brf. at 22, emphasis added.) She suggests that liquidated damages are not available in these situations and asserts that, as a result, "[l]iquidated damages under the . . . FLSA (after 1947) are not compensatory; they are available as a deterrence to those employers who do not act in 'good faith.'" (*Id.* at 26 n.17.)

That characterization of the Portal-to-Portal Act is inaccurate. Section 11 provides in relevant part that:

> "[I]f the employer shows to the satisfaction of the court that the act or omission giving rise to [the lawsuit] was in good faith *and* that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], the court *may, in its sound discretion*, award no

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[2] Act of May 14, 1947, ch. 52, § 11, 61 Stat. 89.

liquidated damages or award any amount thereof not to exceed [full liquidated damages under § 216]." 29 U.S.C. § 260 emphasis added).

Thus, the Portal-to-Portal Act does not make liquidated damages "unavailable" in any situation. It simply provides that in exceptional cases the court *may*, in its discretion, remit liquidated damages in whole or in part. The conditions that must be met for the court to have this discretion are rigorous: the employer must show both a subjective good faith intention to meet the dictates of the FLSA, and that its judgment was objectively reasonable. *See Williams* v. *Tri-County Growers, Inc.*, 747 F.2d 121, 129 (3d Cir. 1984).

Moreover, even when an employer meets this "substantial burden," the court may still award full liquidated damages in addition to back wages. *McClanahan* v. *Mathews*, 440 F.2d 320, 323 (6th Cir. 1971). *See also Hayes* v. *McIntosh*, 604 F.Supp. 10, 21 (N.D. Ind. 1984) ("Should the court find that the defendants did act in good faith and had reasonable grounds to believe that they were not violating the Wage and Hour laws, the court still has the discretion to award liquidated damages.")[3]

Congress passed the Portal-to-Portal Act because it was keenly concerned with the FLSA's financial impact on employers. The Findings and Policy section sets out those concerns explicitly: interpretations of the FLSA had created "wholly unexpected liabilities, immense in amount and

[3] The Department of Labor, charged with administering the FLSA, agrees with this interpretation. *See* 29 C.F.R. § 790.22(b) ("If these conditions are met by the employer against whom the suit is brought, the court is permitted, *but not required*, in its sound discretion to reduce or eliminate the liquidated damages which would otherwise be required in any judgment against the employer.") (emphasis added).

retroactive in operation" which, if permitted to stand, would "bring about financial ruin of many employers and seriously impair the capital resources of many others," as well as adversely affect the public fisc by creating claims for refunds of taxes and by increasing the cost to the government of goods and services purchased both in the future and in the past (during World War II).[4] It is difficult to see why, under these circumstances, Congress would permit the "punishment" of employers whose violations of the Act were both reasonable and in good faith. Rather, the only rational purpose that Congress could have had for allowing courts to award liquidated damages against such employers is to compensate the employee. It is not surprising, then, that the Commissioner cites no support in the legislative history for her position that the Portal-to-Portal Act changed the nature of liquidated damages under the FLSA.

Nor is it surprising that many courts have held since passage of the Portal-to-Portal Act that liquidated damages under the FLSA are compensatory and not punitive. See, *e.g.*, *Marshall* v. *Brunner*, 668 F.2d 748, 753 (3d Cir. 1982). The District of Columbia Circuit directly addressed the effect of the Portal-to-Portal Act on the compensatory nature of liquidated damages under the FLSA in *Thompson* v. *Sawyer*, 678 F.2d 257, 281 (D.C. Cir. 1982), a case brought by a government employee for violation of the Equal Pay Act of 1963, 29 U.S.C. § 206(d).[5] The government

[4] The Findings and Policy section is section 1 of the Portal-to-Portal Act, 29 U.S.C. § 251. The principal focus of the Act, of course, was to eliminate "portal-to-portal" liability -- liability of employers for time spent by employees while engaged in so-called "preliminary" or "postliminary" activities. 29 U.S.C. § 254(a).

[5] "Under the Equal Pay Act, employees have access to the recovery provided by the FLSA, including unpaid wages and an additional equal amount as 'liquidated damages,' 29 U.S.C. § 216(b), (c) (Supp. III 1979)." *Thompson*, 678 F.2d at 263.

contended that the plaintiff was not entitled to liquidated damages because: (1) the FLSA was being applied retroactively; (2) liquidated damages under the FLSA as modified by the Portal-to-Portal Act were penal; and (3) retroactive application of a penal provision was unconstitutional. *See id.* at 279-81. The court rejected the government's position, holding that "FLSA liquidated damages remain compensatory in character, even though they may be remitted." *Id.* The court explained:

> "Nothing in the statutory history of the Portal Act suggests that Congress was dissatisfied with the determination that liquidated damages were compensatory. Instead, the history of the Portal Act is replete with evidence that § 260 was intended to provide courts with flexibility when an award of liquidated damages would be unfair to the employer. *A legislative decision to allow courts to balance compensating employees against imposing costs on employers hardly transforms the award to a penalty.*" *Id.* (emphasis added, citations omitted).

Indeed, even the Commissioner has taken the position, prior to this case, that post-1947 FLSA liquidated damages are compensatory, not penal. In Rev. Rul. 69-581, 1969-2 C.B. 25, the Commissioner addressed the question of whether an employer's payments of liquidated damages under the FLSA are deductible ordinary and necessary business expenses or, rather, nondeductible penalty payments. The Commissioner found the payments deductible, reasoning that, "[t]he provisions of section 16(b) of the Fair Labor Standards Act of 1938 are *not penal* in nature. The liquidated damages provided for therein constitute *compensation* for delay in the payment of sums due under the Act. See *Overnight Motor Transportation* . . .

and *Brooklyn Savings Bank* . . . ." *Id.* at 26 (emphasis added).

In short, the holdings in *Overnight Motor Co.* and *Brooklyn Savings Bank* that FLSA liquidated damages compensate employees for injuries to their health and well-being that are "obscure and difficult of proof" remain good law. The FLSA remedial scheme meets the *Burke* test of including compensation for intangible elements of injury which are nonpecuniary in their immediate consequence.

II. ADEA LIQUIDATED DAMAGES MEET THE *BURKE* TEST

A. The Term "Liquidated Damages" Has The Same Meaning Under The ADEA As It Does Under The FLSA And Hence ADEA Liquidated Damages Compensate For Nonpecuniary Losses.

The ADEA's remedial provisions incorporate by reference those of the FLSA, and are to be interpreted in a similar manner. Congress directed generally that the ADEA be enforced in accordance with the "powers, remedies, and procedures" of the FLSA, and specifically that:

> "Amounts owing to a person as a result of a violation of [the ADEA] shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of [the remedial provisions of the FLSA]: *Provided*, That liquidated damages shall be payable only in cases of willful violations of [the ADEA]." 29 U.S.C. § 626(b).

This Court in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), explained that "in enacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions *and their judicial interpretation* and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation," *id.* at 581 (emphasis added). It elaborated that the "selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA." *Id.* at 582. Congress deliberately adopted by reference the precise term "liquidated damages" as used in the FLSA; the only change it made was, in the proviso, to the circumstances in which liquidated damages are available. *Id.* at 581-82. Congress gave no indication that the *meaning* of the term liquidated damages would differ from that in the FLSA and, as *Lorillard* teaches, in the absence of an express change, the meaning remains the same.

As demonstrated above, *see* Part I, FLSA liquidated damages compensate for intangible, nonpecuniary personal injuries. While the intangible injuries suffered by victims of age discrimination may in some cases be different from those suffered by workers who do not receive their statutory minimum wages on time, it is clear that by importing the remedy of FLSA liquidated damages, Congress intended to compensate for the nonpecuniary losses suffered by ADEA claimants.

The case law supports this view. Thus, *Schmitz* v. *Commissioner*, 34 F.3d 790 (9th Cir. 1994), relied on *Brooklyn Savings Bank*'s interpretation of the FLSA to conclude that "[ADEA] liquidated damages 'serve to compensate the victim of age discrimination for certain nonpecuniary losses,'" *id.* at 793 (citations omitted). The *Schmitz* court then gave specific examples of such injuries:

> "emotional distress . . . [plaintiffs] may suffer upon return to work . . . lost reputation . . . their families' emotional distress and suffering . . . or any number of other injuries. . . . [However, b]ecause each employee's injuries differ – in ways that cannot be calculated – we need not devise a consistent explanation of the precise injuries ADEA liquidated damages redress. Rather, we believe that Congress's use of the term *liquidated* is dispositive." *Id.*, at 796 n.8 (emphasis in original).

Accord Graefenhain v. *Pabst Brewing Co.*, 870 F.2d 1198, 1205 (7th Cir. 1989) ("[ADEA] liquidated damages ... serve as compensation for a discharged employee's *nonpecuniary losses*") (emphasis added); *Powers* v. *Grinnell Corp.*, 915 F.2d 34, 41-42 (lst Cir. 1990) (same). See also H.R. Rep. No. 950, 95th Cong., 2d Sess. 13-14 (1978) (Conference Committee Report to the Age Discrimination in Employment Act Amendments of 1978), *reprinted in* 1978 U.S.C.C.A.N. 528, 535 (same).

B. *Thurston* Does Not Establish That ADEA Liquidated Damages Serve Only A Punitive Purpose.

The proviso to the ADEA's remedial provision, 29 U.S.C. § 626(b), limits the award of liquidated damages for prevailing ADEA plaintiffs to "cases of willful violations." In *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 125-29 (1985), the Court was asked to decide the meaning of "willful" in that provision. Noting legislative history supporting the idea that ADEA liquidated damages were intended to have a deterrent effect, the Court concluded that Congress intended that liquidated damages be awarded only if "the employer knew or showed reckless disregard for the

matter of whether its conduct was prohibited by the ADEA." *Id.* at 126 (citation omitted).

In our view, *Thurston* establishes only the circumstances when a plaintiff can recover liquidated damages under the ADEA. The Commissioner claims to the contrary that, because *Thurston* characterized ADEA liquidated damages as "punitive in nature," such damages are "*solely* 'punitive in nature,'" and thus cannot serve any compensatory purpose. Pet. Brf. at 23 (emphasis added).

This argument has repeatedly been rejected in the Courts of Appeals. The issue was presented in the context of ADEA plaintiffs seeking pre-judgment interest in addition to liquidated damages. These plaintiffs reasoned that, since *Thurston* established that ADEA liquidated damages were meant to punish employers, such damages could not also serve the function of compensating plaintiffs for delay. The ADEA plaintiffs thus argued that they were entitled to prejudgment interest in addition to liquidated damages, contrary to the holding as to the FLSA in *Brooklyn Savings Bank*.[6] This argument has generally failed. A significant majority of Courts of Appeals have held, after considering *Thurston*, that ADEA liquidated damages serve a compensatory function in addition to a punitive function.

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[6] *Brooklyn Savings Bank* held that pre-judgment interest under the FLSA was not available because liquidated damages already compensated the plaintiffs for delay. 324 U.S. at 715-16. The vast majority of Courts of Appeals had held, prior to *Thurston*, that this reasoning applied equally in the ADEA context. *See e.g., Kolb* v. *Goldring, Inc.*, 694 F.2d 869, 875 (1st Cir. 1982); *Spagnuolo* v. *Whirlpool Corp.*, 641 F.2d 1109, 1114 (4th Cir. 1981); *Rose* v. *National Cash Register Corp.*, 703 F.2d 225, 230 (6th Cir. 1983); *Gibson* v. *Mohawk Rubber Co.*, 695 F.2d 1093, 1101-03 (8th Cir. 1982); *Blim* v. *Western Elec. Co.*, 731 F.2d 1473, 1479-80 (10th Cir. 1984). *But see Criswell* v. *Western Airlines, Inc.*, 709 F.2d 544, 556-57 (9th Cir. 1983).

Thus, the Seventh Circuit held in *Graefenhain* that "while liquidated damages serve a deterrent or punitive function, Congress also intended liquidated damages to serve as compensation for a discharged employee's *nonpecuniary losses*." 870 F.2d at 1205 (emphasis added). The First Circuit similarly concluded in *Powers* that ADEA liquidated damages have both a compensatory and a punitive purpose. The court noted that *Thurston* focused only on *when* liquidated damages could be awarded, and did not consider whether liquidated damages may simultaneously serve a compensatory function. *See Powers*, 915 F.2d at 41. And in *Blum* v. *Witco Chemical Corp.*, 829 F.2d 367, 382 (3d Cir. 1987), the Third Circuit also held that liquidated damages had both a compensatory and a punitive purpose. *See also Hamilton* v. *1st Source Bank*, 895 F.2d 159, 166 (4th Cir. 1990) ("*Thurston* did not address the issue of prejudgment interest, and its holding regarding liquidated damages as punitive was in the context of defining the standard for 'willfulness'"); *Burns* v. *Texas City Refining, Inc.*, 890 F.2d 747, 752 (5th Cir. 1989) (holding, post-*Thurston*, that because the purpose of liquidated damages is to "provide for otherwise difficult to calculate costs such as the loss of the use of unpaid wages," an ADEA plaintiff could not recover both prejudgment interest and lost wages).[7]

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[7] *Downey* v. *Commissioner*, 33 F.3d 836 (7th Cir. 1994), held that ADEA damages either were "strictly punitive," or their sole function was to replace pre-judgment interest. The Court found it unnecessary to determine which view was correct. "In any event . . . they do not compensate for the intangible elements of a personal injury." *Id.* at 840. However, while pre-judgment interest may be subsumed within ADEA liquidated damages, such damages must include more than prejudgment interest, for two reasons. *First*, as the Seventh Circuit itself recognized in *Heiar* v. *Crawford County*, 746 F.2d 1190 (7th Cir. 1984):

> "When double damages are awarded, they usually will be far greater than would be necessary to compensate the plaintiff

(continued...)

C. The Limitation Of Liquidated Damages To Victims Of Willful Age Discrimination Represents Nothing More Than A Legislative Compromise Between The Interests of Employers and Employees.

The reason why the Commissioner's pivotal argument here -- that the limitation of ADEA liqudated damages to cases of willful violations establishes that they are solely punitive -- is unavailing was articulated most succinctly by the Ninth Circuit in *Schmitz*. That case involved the precise issue before the Court today: the excludibility of ADEA damages from income under IRC § 104(a). The *Schmitz* court held that limiting ADEA liquidated damages to victims of willful discrimination does not make those damages noncompensatory. Rather, it represents an ordinary legislative compromise between the interests of employers and employees:

> "the mere fact that liquidated damages are available in cases of 'willful' discrimination does not transform them into punitive damages or eliminate their compensatory purpose. . . . In

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[7] (...continued)

> for delay – *far greater, that is, than an award of prejudgment interest would be*. Of course interest can mount up, but the short outside statute of limitations ... makes it unlikely that it will mount up to the point where it is equal to the principal." *Id*. at 1202 (emphasis added).

Second, pre-judgment interest does not fit the definition of liquidated damages established in *Brooklyn Savings Bank*: "damages too obscure and difficult of proof for estimate other than by liquidated damages." Pre-judgment interest is neither obscure nor difficult of proof. Once the amounts and dates of the lost wages are established and the interest rate selected, pre-judgment interest can be calculated by a simple mathematical formula.

> enacting ADEA, Congress was likely attempting to balance the need to compensate victims and deter discrimination with the need to protect businesses from crushing liability. . . . [W]e see nothing 'peculiar' in Congress's decision to resolve these competing interests by compensating victims of willful discrimination at a higher rate than victims of 'nonwillful' discrimination: Congress has simply decided as a public policy matter that only victims of willful discrimination should receive obscure and difficult to prove compensatory damages." *Schmitz*, 34 F.3d at 795.

In short, Congress's decision to limit liquidated damages to cases where the discrimination was willful does not represent a decision that plaintiffs' compensation shall be limited to lost wages. Rather, it is a decision that only particularly blameworthy employers will be liable for also compensating plaintiffs for intangible, nonpecuniary injuries.

Indeed, as the 1991 Civil Rights Act demonstrates, when Congress seeks to impose "solely" punitive damages, it does so expressly. *See* 42 U.S.C. § 1981a(b)(1) (If the defendant is shown to have acted with "malice or with reckless indifference to the federally protected rights of an aggrieved individual," the plaintiff may recover "punitive damages."). Congress's decision to provide for FLSA "liquidated" damages as a remedy in ADEA, rather than for expressly "punitive" damages, signals clearly Congress's intention. As *Schmitz* put it, "[i]f Congress said 'liquidated,' we will assume that Congress meant liquidated." 34 F.3d at 795.

D. The Limitation of ADEA Liquidated Damages to Situations Involving More Culpable Defendants is Similar to the Balancing of Remedies in the Civil Rights Statutes Which the Commissioner Has Recognized Meet the *Burke* Test.

The Commissioner's contention that the punitive aspect of ADEA liquidated damages renders them non-compensatory is inconsistent with her treatment of damages awarded for gender and race discrimination in Rev. Rul. 93-88, 1993-2 C.B. 61. After the 1991 Civil Rights Act, plaintiffs who have suffered intentional discrimination as a result of their race or gender can recover, in addition to backpay, other compensatory damages and punitive damages.[8] *See* 42 U.S.C. §§ 1981, 1981a(a)(1), and 2000e-5(g). Plaintiffs who can prove only disparate impact are limited to recovery of backpay. Rev. Rul. 93-88 holds that compensatory damages for intentional discrimination are excludible, even if a particular plaintiff receives only backpay; damages for disparate impact discrimination, however, are not excludible.

Thus, under the scheme existing after the 1991 Civil Rights Act, whether successful plaintiffs may recover compensatory damages beyond backpay depends on the culpability of their employers (disparate treatment or disparate impact).[9] By the logic in the Commissioner's

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[8] In the case of gender discrimination, compensatory damages other than backpay and punitive damages are limited in amount, *see* 42 U.S.C. § 1981a(b)(3)).

[9] As in the case of ADEA, Congress intended that damages for disparate treatment discrimination serve both a compensatory and deterrent purpose. *See, e.g.*, H.R. Rep. No. 40, 102d Cong., 1st Sess., pt. 1, at 69 (1991): (continued...)

brief, the additional compensatory damages serve only a punitive function because they are awarded only in cases where the employer is found to have greater culpability, and therefore they should not be excludible under § 104(a). However, Rev. Rul. 93-88 holds that the availability of compensatory damages beyond backpay renders all compensatory damages awarded to victims of disparate treatment discrimination excludible from income, and only damages for the lesser offense -- disparate impact -- are not.

The Commissioner's argument also is inconsistent with her treatment in Rev. Rul. 93-88 of damages received under the Americans With Disabilities Act, 42 U.S.C. § 12101-12213 ("ADA"). Pursuant to 42 U.S.C. § 1981a(a)(2), compensatory damages beyond backpay are available for a violation of § 102(b)(5)(A) of the ADA.[10] Under the holding of Rev. Rul. 93-88, all compensatory damages for such a violation are therefore excludible from income. Yet, pursuant to § 1981a(a)(3), the defendant has a complete defense to such damages if it can demonstrate good faith efforts, in consultation with the plaintiff, to identify and make reasonable accommodations that would provide an equally effective opportunity and not cause undue hardship. Thus, the Commissioner's ruling that these damages are excludible is impossible to reconcile with her litigating position that damages in such cases "are not compensatory;

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[9] (...continued)
"[m]aking employers liable for all losses -- economic and otherwise -- which are incurred as a consequence of prohibited discrimination, and which are proved at trial, will serve as a necessary deterrent to future acts of discrimination, both for those held liable for damages as well as the employer community as a whole." *See also* 137 Cong. Rec. H9526 (daily ed. Nov. 7, 1991).

[10] Section 102(b)(5)(A) makes unlawful the failure by a covered entity to make reasonable accommodations for the known physical or mental limitations of an otherwise qualified individual, unless those accommodations would cause an undue hardship to the entity.

they are available as a deterrence to those employers who do not act in 'good faith.'" Pet. Brf. at 26 n.17.

Both the civil rights statutes discussed in Rev. Rul. 93-88 and the ADEA are "part of a wider statutory scheme to protect employees in the workplace nationwide." *McKennon* v. *Nashville Banner Publishing Co.*, No. 93-1543, slip op. at 4 (Jan. 23, 1995). The common thread running through their remedial regimes is that Congress has chosen to strike a balance between the interests of plaintiffs and defendants by linking the ability of a plaintiff to recover compensatory damages for nonpecuniary harms to the level of culpability of the defendant. This linkage, however, does not convert compensatory damages to "solely" punitive damages.

III. THE COMMISSIONER'S REMAINING ARGUMENTS ARE MERITLESS

The Commissioner's remaining arguments deserve only brief mention. The Commissioner argues that ADEA liquidated damages are not excludible under § 104(a) because they are awarded "on account of" the defendant's willful misconduct rather than "on account of" the plaintiff's personal injury. This argument fails for three reasons. First, it is based on the faulty premise that ADEA liquidated damages are "solely" punitive. Second, it is inconsistent with Rev. Rul. 93-88. Third, it proves too much. It compels the conclusion that damages in an ordinary negligence action are not excludible. For the plaintiff to recover damages in any negligence action, the defendant must be shown to have violated a duty of care. By the reasoning in the Commissioner's brief, the plaintiff is awarded damages "on account of" the defendant's violation of the duty of care, not "on account of" plaintiff's injuries, and therefore the damages do not satisfy § 104(a)(2).

The Commissioner also argues that liquidated damages cannot be considered to compensate for intangible injuries because the amount of the liquidated damages award is calculated without consideration of the extent of those injuries. *See* Pet. Brf. at 20, 25 n.15. The Commissioner, however, misses the point of *liquidated* damages which is to avoid the necessity of proving and calculating the amount of obscure and difficult-to-prove damages. Thus, in *Atchison, T & S.F. Ry.* v. *Nichols*, 264 U.S. 348 (1924), this Court found that damages under a wrongful death statute which provided for a fixed liability of $5,000 were compensatory. The Court noted that, when the injuries suffered are difficult to estimate, it is within the power of the State to provide for a fixed amount of damages; such damages were "not less reparative" because the "reparation is in a fixed amount." *Id.* at 351-52.[11] See also *Molzof* v. *U. S.*, 112 S. Ct. 711, (1992).

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[11] By contrast, the Commissioner and *Downey* are incorrect in their implication that liquidated damages are solely a contractual remedy. *See* Pet. Brf. at 21 n.11; *Downey*, 33 F.3d at 846. While liquidated damages are frequently used in contractual situations, Congress and the States have also used them to compensate for tort-type injuries. Thus, *Rex Trailer Co.* v. *United States*, 350 U.S. 148 (1956), the very case cited by *Downey*, upheld an award of liquidated damages under the Surplus Property Act of 1944, 50 U.S.C. app. § 1635, 58 Stat. 765, 780, *repealed*, June 30, 1949, ch. 288, tit. VI, § 502(a)(1). These liquidated damages compensated the United States for difficult to prove damages from fraudulent misrepresentation, *see* 350 U.S. at 153-54, a classic tort. *See* RESTATEMENT (SECOND) OF TORTS § 525. Likewise, in *Nichols*, *supra*, 264 U.S. at 350-51, New Mexico chose to compensate at a fixed amount certain cases of wrongful death, which is also clearly a tort. *See also Molzof*, 112 S. Ct. at 716.

Moreover, the ADEA sets forth tort, not contractual, duties. The "public-law duty not to discriminate exists regardless of the parties' contractual relationship." *Schmitz*, 34 F.3d at 793. *See also Brooklyn Savings Bank*, 324 U.S. at 708-09 (liquidated damages under the FLSA, as public-private right, cannot be waived by contract). As this Court recently held, the rights and remedies provided by ADEA, far from being

(continued...)

The Commissioner also complains that evidence of the plaintiff's specific injuries is not even admissible in ADEA litigation. See Pet. Brf. at 18-19, 25 n.15. But where only liquidated damages are available, evidence of the specific damages incurred by the plaintiff is irrelevant. Indeed, it may even be prejudicial in a jury trial on the issue of liability. *See, e.g., Haskell* v. *Kaman Corp.*, 743 F.2d 113, 121 (2d Cir. 1984).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[11] (...continued)
matters of contract, are "part of a wider statutory scheme to protect employees in the workplace nationwide." *McKennon*, slip. op. at 4.